SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 3

THE UNITED STATES OF AMERICA,
Petitioner

v.

JESSE W. JEFFERS, JR.

N WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENT

T. EMMETT MCKENZIE,
JAMES K. HUGHES,
LEONARD L. LEIMBACH,
Counsel for Respondent.

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BRIEF FOR RESPONDENT, JESSE W. JEFFERS, JR.

Counter-statement of the Case

At page 6 of Brief for the United States of America, it is asserted that the police officer who made the search and seizure under consideration "had no time to send out for help", (R. 29).

Respondent, believing this phase of the litigation requires amplification, presents certain additional matter appearing in the record.

In every other respect respondent finds the government's presentation adequate, accurate and fair.

(R. 27):

By Mr. Hughes: (Cross examination of the witness Karper).

Q. What time did you get this phone call, did you say, Lieutenant Karper?

A. I would say about 3:45.

Q. You say you got the phone call at home?

A. Yes, sir.

* * * * * * *

Q. What time did you say you arrived at the Dunbar Hotel?

A. About 4 o'clock.

Q. And you received the information which you have related to the Court from the house detective up there? Isn't that right?

A. That is right.

Q. You had no search warrant for this room?

A. No, sir.

Q. You had no warrant of arrest for anybody whom you believed to be in there?

A. No, sir.

Q. There are telephones in the Dunbar Hotel, are there not?

(R. 28)

The Court: I think there would be telephones in any hotel.

Mr. Hughes: I think in the Appellate Court it may appear important, Your Honor.

The Court: You may answer.

The Witness: There is a telephone on Scott's desk.

By Mr. Hughes:

Q. And that telephone was available to you for the purpose of calling the precinct and getting help?

A. Yes, sir.

Q. And it would have been a pretty easy matter for you to have called the precinct for help and stationed a man outside of this room while you went down and made application for a search warrant?

A. It could have been, yes, sir.

Q. You didn't see fit to do that?

A. No, sir.

Q. You entered the room?

A. Officer Scott and myself.

Q. And do you remember which one of the two of you entered first?

A. Officer Scott got the duplicate key for the room. No, I think I was probably the first one in the room.

Q. So Officer Scott had the key, and you opened the door and went in? Is that right?

A. Yes, sir, as well as I can remember.

Q. You and Officer Scott went in the room?

A. Yes, sir.

Q. And searched it?

A. Yes, sir.

Q. At the time you arrested the defendant, the defendant had a key to that room, on him, didn't he?

A. Yes, sir.

Q. And that is the key to the aunts' room you have testified to?

A. Yes, sir.

Q. Now, when you arrived at the Dunbar Hotel, you received certain information from the house detective? Is that right?

A. Yes, sir.

Q. And it was possible, was it not, at that time for you to take Mr. Scott before a committing magistrate and make application for search warrant for the premises?

A. Probably so, yes, sir.

Mr. Hughes: That is all.

The Court: Is there any redirect examination?

(R. 29)

Redirect examination.

By Mr. McLaughlin:

Q. Why didn't you do it, officer?

A. I wanted to get in that room and get that cocaine before it disappeared. I had no time to send out for help. I don't call for help if there is something I can do myself; and I don't need any help.

Mr. McLaughlin: That is all.

Recross examination. By Mr. Hughes:

Q. And you don't care whether you do it legally or illegally?

Mr. McLaughlin: I object to that.

The Court: Objection sustained.

Q. And you had no evidence there was anything in that room?

Mr. McLaughlin: I object.

The Court: He testified the only information he had was that which he received from Scott.

The Witness: Yes, sir.

ARGUMENT

Summary of the Argument

I

Rule 41 (e) and (g), Rules of Criminal Procedure for the District Courts of the United States, specifically affords respondent the full protection of Amendment IV, of the Constitution of the United States in this proceeding.

II

The illegality of the search of the apartment in the instant cause was ground for excluding the evidence seized, in that:

1. Respondent had the requisite proprietary and possessory interest therein; and
2. Had such standing as a guest therein.

III

A search and seizure in a private domicile, illegal under the terms and provisions of Amendment IV, does not become legal because the property seized proves to be contraband.

Argument

I

The rules of Criminal Procedure for the District Courts of the United States, provide in part as follows:

I. Scope, Purpose, and Construction.

Rule 1. Scope. These rules govern the procedure in the courts of the United States * * * in all criminal proceedings, with the exceptions stated in Rule 54.

Rule 41. Search and Seizure.

(e) Motion for Return of Property and to Suppress Evidence. *A person aggrieved* by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, * * *. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored *unless otherwise subject to lawful detention* and *it shall not be admissible in evidence at any hearing or trial.*

* * * * * * *

(g) Scope and Definition. This rule supersedes the Act of June 15, 1917, c. 30, Title XI, sections 1-6, 10, 11, 12-16, 40 Stat. 228, 229, 18 U. S. C. 611-616, 620, 621, 623-626, and any other provision of chapter 30 of that Act inconsistent with this rule. It does not modify any other act, inconsistent with this rule regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. *The term "property" is used* in this rule *to include documents, books, papers and any other tangible objects.*

In the Notes to the Rules as prepared under the direction of the Advisory Committee on Rules for Criminal Procedure appointed by the Supreme Court of the United States, at pages 72, 73 of the Notes to the Rules, we read as follows:

For statutes * * * now controlled by this rule, see, e.g.:

* * * Title 26, section 3116 (U. S. C.) (Forfeitures and seizures).

Respondent presently addresses himself to a consideration of the legal effect and meaning of the phrase "a person

aggrieved", as used in Rule 41 (e)—animadverting to a further consideration of the rule under Argument III.

In volume 3, C. J. S., under the heading "Aggrieved" we read that a person aggrieved is "one who has been injuriously affected by the act complained of; the real party adversely affected".

It appears to be entirely reasonable to assert that respondent has been truly aggrieved in the instant cause.

What legal impediment then bars him from asserting the rights granted in Rule 41 (e)?

Title 18, U. S. C., Chapter 205—Searches and Seizures, sections 3101-3116 embodies Rule 41 in its entirety. Section 3114. Return of seized property and suppression of evidence; motion—(rule), reads as follows:

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Return of property and suppression of evidence upon motion. Rule 41 (e).

Prior to the enactment of this statutory rule of criminal procedure, the phrase "a person aggrieved", was not part of our written law of search and seizure. The adjudicated cases were in the main concerned with interpretation and construction of the language used in Amendment IV, and no case cited by the government, emanating from this court, has decided what persons affected by a search and seizure, without warrant, involving a private dwelling, may claim to be persons aggrieved, under this statute.

Respondent makes no attempt to construe the rule in question according to the philosophy and determinations set forth in cases decided prior to the enactment of the rule. A national advertiser concerned with the marketing of cigarettes admonishes the public thus: "Something New Has Been Added", and exhorts consideration of his product upon the basis of its recently supplemented quality and

composition. It would appear that an analogous situation is presented in the instant litigation—the rights of respondent are to be measured and determined in the light of the "new" written law—"a person aggrieved"; and no interpretation of cases decided upon considerations ignoring this phrase—as matter of written law—may afford the solution to the instant question.

The government earnestly advances the proposition that those persons only who have possessory or proprietary interest, and this interest to be exclusive, may claim the benefits of the rule in question.

From whence comes this meaning of the phrase in question?

No lexicographer has defined the phrase "a person aggrieved", to mean a person adversely affected by an act complained of, who enjoys exclusive possessory or proprietary interest in designated premises. To reach such a result it becomes necessary to embark upon statutory construction—to delve into the possible intent of the legislature and by some metaphysical labor reach the conclusion that the language of the Rule and Statute—plain and unambiguous as it is—does not mean what the words used in the Rule and Statute usually and ordinarily mean; that they mean something else, other and entirely different.

But there are rules for statutory construction; and in 59 C. J., sec. 569, pp. 952-957, these are set forth, in part, as follows:

> * * * intention of the legislature is to be obtained primarily from the language used in the statute. * * * Where the language of a statute is plain and unambiguous, there is no occasion for construction, *even though other meanings could be found;* and the court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, but *the statute must be given effect accord-*

ing to its plain and obvious meaning, and cannot be extended beyond it because of some supposed policy of the law, * * *. Citing *U. S.* v. *Standard Brewery,* 40 S. Ct. 139, 251 U. S. 210, 64 L. Ed. 229, and numerous other cases.

Respondent cites, *infra, United States* v. *Janitz,* D. C., N. J., 6 F. R. D. 1, 2, 3, to which case the government calls attention at page 20 of its brief, pointing out that in *Lagow* v. *United States,* 159 F. 2d 245, the Second Circuit declared that it could not accept the doctrine in the *Janitz* case.

Nonetheless respondent urges consideration of the *Janitz* case by this court in view of the circumstances of this case; for, unlike the *Lagow* case, the *Janitz* case determines the problem from the plain and unambiguous language of the statute and not from adjudications handed down prior to the enactment of the statute involved.

This appears to be the approved practice.

United States v. *Janitz,* D. C. N. J., 6 F.R.D. 1, 2, 3.

Seven men were indicted, charged in the first count with conspiracy under title 18, U.S.C.A. sec. 88; in the second, for unlawfully fermenting mash under Title 26 U.S.C.A. Int. Rev. Code, sec. 2834; and in the third, for unlawfully possessing an unregistered still under Title 26 U.S.C.A. Int. Rev. Code, sec. 2810 (a).

* * * Divers motions were directed to the Court seeking the suppression of the evidence, * * * as against all defendants. The result was the suppression of the evidence, * * * against the defendant Conklin. It appeared that he was the owner of the premises whereon the seizure was made and the circumstances were such that a search warrant should have been first obtained. The indictment was dismissed as to the defendant Petti * * * and was dismissed on the first count only, as to the defendants Mastroberte and Betsy. The motion was denied as to the remaining defendants.

Thereafter the government again moved the case for trial and again counsel for the remaining defendants addressed a motion to the court seeking to suppress the evidence as to them. This time, basing the motions on the provisions of Rule 41 (e) which had, in the interim, become effective. The rule provides as follows: "A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissable in evidence at any hearing or trial. * * *"

We are here concerned with the question as to whether or not, under the foregoing rule, the evidence so seized as above may be used against these remaining defendants. *Can they now complain in the absence of a proprietary interest?*

(1) There seems to be no ambiguity whatever in the language of the rule. It says that evidence so obtained "shall not be admissable in evidence at any hearing or trial."

* * * Prior to the adoption of this rule the law was firmly established in this circuit to the effect that one could not complain of an unlawful search and seizure unless he had a proprietary interest in the property wrongfully seized. * * * The remaining defendants in the instant case had no interest whatever in the property and under the law, as it was prior to the new rule, they could not be heard to complain. * * * This was the view prior to the Congressional enactment of Rule 41, *which places the rule in the sphere of legislation transcending a mere rule of court.*

(2-6) We cannot harmonize the above opinion with the provision of the rule that such evidence cannot be used at any hearing or trial. *To do so would cause the court to enter the legislative field.* The rule of construction is that language of this type shall be given its usual and generally accepted meaning. *Whether or not the words in question vest any right in any one to*

complain is beside the point. The rule must be construed as a restriction on the power of the court to permit the introduction of such tainted evidence. And, if prior to or in the course of a trial the issue is raised, the court must follow the Act of Congress. Indeed it would seem to be the duty of the Court itself to raise it. Nor is this altogether undesirable since if the government through its agents and without justification carried away, or seized property unlawfully, it cannot be and ought not to be permitted in justice or sound reason to gain any advantage whatever from such illegal conduct. The motion to suppress as to the remaining defendants is granted.

(Note: Italics by brief writer.)

II

The illegality of the search of the apartment in the instant cause, was ground for excluding the evidence seized, in that:

1. Respondent had the requisite proprietary and possessory interest; and

2. Had such standing as a guest.

At R. 7. Direct examination. By Mr. Hughes, we find:

Q. * * * where do you live, Miss Jeffries?

A. Dunbar Hotel.

Q. And how long have you lived there?

* * *

A. Since July, 1949.

Q. The defendant here is your nephew? Is that right?

A. That is right.

Q. And how long has he had a key to the room you occupy at the Dunbar Hotel?

A. Even since we have been there.

* * *

Q. Does he have permission to use your room at the Dunbar Hotel whenever he sees fit?

A. Yes, he does.

R. 8.

* * *

Q. Did he have a key to your room or apartment?

A. Yes, he did.

Cross examination. By Mr. McLaughlin:

Q. And you occupy that apartment with whom?

A. My sister.

* * *

Q. And you pay the rent for that room, that apartment?

A. Yes, that is right.

Q. And that apartment, in the ledger of the hotel, is in your and your sister's name, isn't it?

A. Yes.

Q. Those are the only two names listed in that apartment? Isn't that right?

A. Yes.

* * *

R. 9.

Q. Your nephew, the defendant here, he occupies a room (meaning a different room) in that hotel, doesn't he?

A. He did.

Q. Well, I meant he did on September 12, didn't he, Madam?

A. Yes.

* * *

From this testimony it appears that respondent had the right of use of the premises in question, at and according to his pleasure. Nothing appears in the record to indicate a restricted or limited use of the premises.

The Government at page 10, Brief, says, "He had no possessory or proprietary interest in his aunt's room, * * *." At page 21, Brief, it is said: "* * * respondent had no possessory or proprietary interest in the room searched * * *."

It is plain that respondent had no exclusive possessory or proprietary interest, as against his aunts; but as against the rest of the world the situation is different.

In *Falkner* v. *State*, 134 Miss. 253, 98 S. 691, 692, it is held that possession in law is the act, fact or condition of a person having such control of property that he may legally enjoy it to the exclusion of others having no better right than himself.

Armed with the key to the premises in question and buttressed with the express grant of right to enter upon and use the premises, respondent contends that he had, as against all but his aunts, such possession in law as entitled him to invoke the benefits of Amendment IV, in the instant cause.

Before proceeding further respondent desires to call the attention of this court to one of its earlier pronouncements respecting "possession".

In *National Safe Deposit Co.* v. *Stead*, 232 U. S. 58, 58 L. Ed. 504, 509, we read:

> This is one of that class of cases which illustrate the fact that, both in common speech and in legal terminology, there is no word more ambiguous in its meaning than possession. It is interchangeably used to describe actual possession and constructive possession which often so shade into one another that it is difficult to say where one ends and the other begins. * * *.

We do not deliberately belabor the point presently argued; but merely strive to evoke a meaning sufficiently

clear for the purposes of the instant cause, out of a factual situation which easily permits of ambiguity.

It being undisputed that respondent had the "use" of the room in question, it is interesting to learn what this court has said concerning use in another case.

In *Billings* v. *United States*, 232 U. S. 261, 58 L. Ed. 596, 605, the Court says:

> • • • Let it be conceded that the ownership of property includes the right to use; plainly we think, as use and ownership are distinguished one from the other in the provision, the word "*use,*" as there employed, *means more than the mere privilege of using* which the owner enjoys, and relates to its primary signification, as defined by Webster: "The act of employing anything or of applying it to one's service; the state of being so employed or applied." If the use which arises from the fact of ownership, without more, was what the statute proposed, then it is inconceivable why the difference between use and ownership was marked in the provision and made the basis of the tax which it imposed. While this construction of the case leads to the same conclusion as does that which the court below affixed to the statute, that is, that it taxed the privilege of use, or, in other words, the potentiality of using involved in ownership, inherently there is this fundamental difference between the interpretation we give and that which the lower court adopted, since the privilege of use is purely passive (or subjective), a right which necessarily pertains to ownership and which must exist when there is ownership, as one may not obtain ownership without acquiring the privileges of use which ownership gives. The other, on the contrary, that is, use in the statutory sense, although it arises from ownership, is active (objective); that is, *it is the outward and distinct exercise of a right which ownership confers,* but which would not necessarily be exerted by the mere fact of ownership.
>
> Italics by brief writer.

And in 66 C.J., under the heading "Use", section 1, pages 65, 67, we read:

> "Use" has been defined as a continued or repeated practice. The word, it has been held, has reference to the habitual or permanent employment of the means to the accomplishment of a purpose.

At pages 21 and 22, Brief, the government contends that, "At the most, respondent merely had a license to enter the room as a guest; * * * *"

The record establishes, clearly and positively, that respondent,

1. Had the key to the premises;
2. The right to make full use of the benefits conferred by possession of the key as he saw fit;
3. The right to use and enjoy and occupy the apartment as he saw fit.

Animadverting to *Billings* v. *United States, supra*— "use", "means more than the mere privilege of using;" and constitutes "the outward and distinct exercise of a right which ownership confers;" how can it be seriously maintained that one exercising a right of ownership in premises is estopped from invoking the guaranties of Amendment IV, respecting such premises?

We next urge respondent's rights as "guest"—the government, Brief, pp. 21, 22, conceding that he was a guest.

Respecting one whom is a "guest" in premises searched and seized without warrant, this court had had little occasion to consider.

In *MacDonald* v. *United States*, 335 U.S. 451, 93 L. Ed. 153, 159, 161, we find this language:

> Mr. Justice Rutledge concurs * * *. With respect to the petitioner Washington (a guest) he is of the

view that the evidence having been illegally obtained, was inadmissible. Cf. *Malinski* v. *New York*, 324 U.S. 401, opinion dissenting in part p. 420 at pp. 430-432, 89 L. Ed. 1029, 1040, 1046, 1047, 65 S. Ct. 781.

Mr. Justice Jackson:

As to defendant Washington; He was a guest on the premises. He could have no immunity from spying and listening by those rightfully in the house. But even a guest may expect the shelter of the roof-tree he is under against criminal intrusion. I should reverse as to both defendants.

In this connection, District of Columbia Code, 1940 Ed., Title 22, section 3102, is of interest. It reads, in part, as follows:

22-3102 (6:57). Unlawful Entry Upon Private Property

Any person who, without lawful authority, shall enter, or attempt to enter, a private dwelling or building against the will of the lawful occupant thereof, * * * shall be deemed guilty of a misdemeanor * * *.

So, the question becomes:

Does a guest in premises, wherein he is not immediately present at the time said premises are searched and property of the said guest seized, without warrant, have standing to invoke the provisions and guaranties of Amendment IV?

This court has not, to our knowledge, passed upon this precise question.

III

A search and seizure in a private domicile, illegal under the terms and provisions of Amendment IV, does not become legal because the property seized proves to be contraband.

In support of this argument respondent again refers to Rule 41 (e), as follows:

> * * * If the motion is granted the property shall be restored *unless otherwise subject to lawful detention* and *it shall not be admissible in evidence* at any hearing or trial.

What is the purpose of this statutory enactment?

Its plain, and we reason, only purpose is to provide and establish the law of the case where the property seized and made the subject matter of a motion to return and suppress, proves to be contraband—property which, by reason of its very nature stands subject to forfeit to the sovereign.

The indictment (R. 1) charges in the first count violation of Title 26, section 2553 (a) U.S.C., which reads as follows:

> It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

The Government, Brief, p. 4, asks the court to consider 26 U.S.C. 2558 (a), in determining this case. That statute reads as follows:

> All unstamped packages of the drugs mentioned in section 2550 (a) found in the possession of any person, except as provided in this subchapter, shall be subject to seizure and forfeiture, and all the provisions of internal revenue laws relating to searches, seizures, and forfeiture of unstamped articles shall be extended to and made to apply to the articles taxed under this subchapter and the persons upon whom the taxes under this subchapter or Part V of subchapter A of chapter 27 are imposed.

Finally, the government, Brief pp. 4, 5, asks contemporaneous consideration of 26 U.S.C. 3116, which reads as follows:

> It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this part, or the internal revenue laws, or regulations prescribed under such part or laws, or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of the act of June 15, 1917, 40 Stat. 228 (U.S.C., Title 18, Sections 611-633), for the seizure of such liquor or property.

Before concluding the citation of 26 U.S.C. 3116, we again call the attention of the court to the Notes To The Rules, pages 72 and 73 of said Notes, as follows:

> For statutes . . . now controlled by this rule, see, e.g.:
>
> . . .
>
> Title 26:
> Section 3116 (*Forfeitures and seizures*).
> Italics by brief writer.

Concluding 26 U.S.C. 3116:

> *Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal revenue laws, or of any other law. The seizure and forfeiture of any* liquor or *property under the provisions of this part*, and the disposition of such liquor or property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such liquor or property, *shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures,* and disposition *of property* or proceeds, *for violation of the internal revenue laws.* Italics by brief writer.

Respondent suggests that the government having adopted in part the Notes of the Advisory Committee—see Government's Brief, p. 20, note 8, paragraph 1, is constrained to pay equal respect to the excerpt from the said Notes set forth above which declares that 26 U.S.C. 3116 is controlled by Rule 41, which provides as follows:

> 41 (a) Authority to issue warrant;
> (b) Grounds for issuance;
> (c) Issuance and contents;
> (d) Execution and return with inventory;
> (e) Motion for return of property and to suppress evidence;
> (f) Return of papers to clerk;
> (g) Scope and definition.

When the Congress, in enacting 26 U.S.C. 3116, provided amongst other things, that "A search warrant may issue * * *.", immediately following the language "no property rights shall exist in any such liquor or property," what purpose had it in mind?

It must be assumed that the Congress was fully aware of all related provisions of law applicable to property subject to forfeiture.

It must be assumed that the Congress was actively conscious of Amendment IV, to the Constitution.

Ergo, it is straining no point to contend that the reference to search warrant presupposed that the agents and servants of the government would, in preventing or punishing violations of that statute, themselves follow and abide by the laws and the Constitution; and attempt no search and seizure of a private residence, unless and until authorized to so do by law.

But it is not necessary to construe to reach this conclusion. The latter part of 26 U.S.C. 3116 says:

> Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal revenue laws, *or of any other law.*

Does this language not mean, precisely, that in proceeding against property and persons subject to the statute, the government was compelled to recognize the protection afforded persons and property by the Constitution of the United States?

How can anyone read into this statute the meaning that where contraband is suspected of concealment in a private dwelling, the government is authorized to enter and seize without warrant; and that evidence so obtained must be admitted in a criminal proceeding instituted against the owner thereof?

We are not required, however, to limit ourselves to the statutes cited by the Government; there being others, dealing with the same subject matter which afford enlightenment.

U.S.C. 21, Section 173 reads as follows:

* * *

> Any narcotic drug imported or brought into the United States or any territory under the control or

jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. * * *

The United States Code informs that 19 U.S.C. 514, and 515 have been repealed—that 19 U.S.C. 1607 and 1608, now govern the case. These sections follow:

1607. Same; value $1,000 or less.

If such value of such vessel, vehicle, merchandise, or baggage returned by the appraiser does not exceed $1,000, the collector shall cause a notice of the seizure of such articles and the intention to forfeit and sell or otherwise dispose of the same according to law to be published for at least three successive weeks in such manner as the Secretary of the Treasury may direct. * * *

1608. Same; judicial condemnation.

Any person claiming such vessel, vehicle, merchandise, or baggage may at any time within twenty days from the date of the first publication of the notice of seizure file with the collector a claim stating his interest therein. Upon the filing of such claim and the giving of a bond to the United States * * * the collector shall transmit such claim and bond, with a duplicate list and description of the articles seized, to the United States attorney for the district in which seizure was made, who shall proceed to a condemnation of the merchandise or other property in the manner prescribed by law.

Under these statutes, the property seized in the instant cause not being smoking opium or opium prepared for

smoking there was no summary forfeiture, and respondent had, in law, a right to claim the property according to law.

Ergo, pending condemnation, or forfeiture in some other legal manner, respondent was recognized by the United States Code, and perforce the United States Government, as having in fact and in law an existing property right in the seized goods or merchandise.

Both the Government and respondent have urged consideration of U.S.C. Title 26, 2558 (a): 26 U.S.C. 2558 (b) is helpful, and reads as follows:

> (b) Seized opium—Confiscation and Disposal—(1) Procedure.
>
> All opium, its salts, derivatives, and compounds, and coca leaves, salts, derivatives, and compounds thereof, seized by the United States Government from any person or persons charged with any violation of this chapter or part V of subchapter A of chapter 27, or the Acts of February 9, 1909, ch. 100, 35 Stat. 614 as amended by the act of Jan. 17, 1914, ch. 9, 38 Stat. 275 (U.S.C. Title 21, sections 171-184), shall upon conviction of the person or persons from whom seized be confiscated by and forfeited to the United States; * * *.

From this statute it will appear that in the instant cause the property seized could not legally be forfeited—summarily—to the United States prior to a conviction; and that as of the time his motion to suppress and return was made and determined the property seized was not the property of the United States, but was property subject to a claim by respondent.

Title 26 U.S.C., 3601, reads:

> Any collector, deputy collector, internal revenue agent, or inspector may enter, in the day time, any building or place where any articles or objects subject

to tax are made, produced, or kept, within his district, so far as it may be necessary for the purpose of examining said articles or objects.

3602:

The several judges of the district courts of the United States, and the United States commissioners, may, within their respective jurisdictions, issue a search warrant, authorizing any internal revenue officer to search any premises within the same, if such officer makes oath in writing that he has reason to believe, and does believe, that a fraud upon the revenue has been or is being committed upon or by the use of the said premises.

So, we find that the use of search warrants is provided for, and required by, the provisions of the Internal Revenue Code and the Food and Drugs Code.

We do not, and cannot, find in the United States Code any statute which purports to confer upon the government the authority to proceed in the manner and fashion urged upon the court by the government in its brief.

Again, and finally referring to Rule 41 the language of subsection (g) as follows:

The term "property" is used in this rule to include documents, books, papers and any other tangible objects.,

cannot be interpreted to exclude contraband. "Any other tangible objects" contemplates and includes everything whatsoever is submitted to a court, as matter of evidence, resulting from the search and seizure made the subject matter of the rule.

Respondent is unable to agree with the Government's contention that the contraband is matter of such a nature

that he was legally powerless to move its exclusion as evidence. It is true that 26 U. S. C. provides in part that "no property rights shall exist" in property such as is here under consideration, but this proviso relates to the forfeiture aspect of the matter only, and not to the criminal aspect of the case.

In *The Palmyra*, 12 Wheat. 1, 6 L. Ed. 531, 535, this court said:

> • • • It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach in rem; but it was a part, or at least a consequence, of the judgment of conviction. It is plain from this statement that no right to the goods and chattels of the felon could be acquired by the crown by the mere commission of the offense; but the right attached only by the conviction of the offender. The necessary result was, that in every case where the crown sought to recover such goods and chattels it was indispensable to establish its right by producing the record of the judgment of conviction. *In the contemplation of the common law, the offender's right was not divested until the conviction.*

To digress, momentarily, from the cited case, it would appear, that in this court at least, if we proceed according to the common law, respondent's motion to suppress was proper and should have been granted.

Returning to the cited case:

> But this doctrine never was applied to seizures and forfeitures, created by statute, in rem, cognizable on the revenue side of the exchequer. The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing; and this, whether the offense be malum prohibitum, or malum

in se. The same principle applies to proceedings in rem, on seizures in the admiralty. Many cases exist where the forfeiture for acts done attaches solely in rem, and there is no accompanying penalty in personam. Many cases exist where there is both a forfeiture in rem and a personal penalty. *But in neither class of cases has it ever been decided that the prosecutions were dependent upon each other.* But the practice has been, and so *this court understands the law to be, that the proceeding in rem stands independent of, and wholly unaffected by any criminal proceedings in personam.* This doctrine is deduced from a fair interpretation of the legislative intention apparent upon its enactments. Both in England and America, *the jurisdiction over proceedings in rem stands independent of, and wholly unaffected by, any criminal proceedings in personam.*

Respondent interprets this language to mean that the statutory divestiture of "property rights" in contraband establishes the rule of the case in the proceeding in rem to declare and effect a forfeiture; and that the established rules and usages of law, observance of which is indispensable to a fair trial under due process of law in a criminal proceeding in personam, are not, and may not be withdrawn from the citizen by reason of the fact a forfeiture legally results from the transaction in question.

As this court succinctly states—the proceedings are not dependent upon each other nor governed by the same rules of procedure.

And the numerous statutes cited by both Government and respondent make this abundantly clear.

Counsel for respondent, here for their first and only appearance before this court, are perplexed with respect to advancing the arguments presented by the majority in the court below.

The opinion of that court is before this; and we deem it presumptuous to copy it, or to rearrange it, and then present it to this court as our own.

We assume that we are not therefore remiss feeling that the principles set forth by the court below will be considered as an independent presentation of the questions involved.

Conclusion

The vigorous and learned effort put forth by the Government evidences a determination to curb an evil traffic which endangers our national well being. It is meet and proper that it should leave no stone unturned in that endeavor.

At the same time it is of paramount importance that our citizenry, the evil as well as the good and noble, have at all times the effective protection of those rights conferred upon them by our Constitution.

The Bill of Rights is substantially the heart and inspiration of our form and system of government.

The right of the people to be secure in their persons, houses, papers and effects, is more important than conviction of a narcotics dealer resulting from a strained and technical interpretation of Amendment IV, which nullifies that constitutional guaranty.

Our people are not the creatures of the government—the government is the servant of the people, whom it cannot serve well and honorably while sponsoring a doctrine which tends to make the Bill of Rights impotent.

We feel that the search and seizure under consideration were deliberately illegal; they represent a police determination to achieve a desired end in flagrant violation of a primary constitutional provision well understood and well known to be immediately effectively available.

This, our highest and most revered court, cannot commend such action by holding that it is, in all respects, right, proper and legal.

Respectfully submitted,

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